Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING MOTION NO MT2-25-89 OF 1996
VISU SINNADURAI J
2 AUGUST 1997

Administrative Law *— Exercise of administrative powers — Judicial review — Decision of a statutory body — Whether decision made appropriate for judicial review — Whether respondent acted in breach of statutory authority or acted unfairly or unreasonably — Whether respondent was the proper party in the suit — Highway Authority Malaysia (Incorporation) Act 1980 s 11*

Civil Procedure *— Prerogative writs/orders — Certiorari — Application for leave to apply for an order for certiorari — Whether applicants have locus standi — Whether respondent was the proper party in the suit — Whether decision made appropriate for judicial review — Whether leave ought to be granted — Rules of the High Court 1980 O 53*

The two applicants were the developer and landowner of the commercial and residential development called Bandar Utama ('the applicants'). They sought leave to quash the approval given by Lembaga Lebuhraya Malaysia ('the first respondent') for the proposed Damansara-Puchong Highway interchange configuration at Jalan Damansara linking Bandar Utama. The first respondent is a statutory body created under the Highway Authority Malaysia (Incorporation) Act 1980 ('the Act') and is the authority responsible for the supervision and execution of the design, construction and maintenance of highways under the Act. The application for leave was heard on an inter partes basis since construction had already commenced and hence was a matter of great urgency for the applicants involved.

The applicants were unhappy with the first respondent's decision regarding the configuration of the highway interchange as it would adversely affect traffic flow and hence affect Bandar Utama. The applicants appealed and submitted counter-proposals based on a traffic consultants report. However, the first respondent rejected their submissions and informed the applicants of the same by their letter of 16 November 1996 ('the letter'). The interchange would be built as planned.

The applicants argued that given their position as landowner and developer of Bank (Bandar?) Utama, they were aggrieved parties as the continued development and traffic flow in Bandar Utama would be adversely affected by the proposed interchange configuration. They argued that the first respondent, in making its decision, had failed to take into account relevant matters such as capacity of the existing roads in designing the proposed configuration. The applicants argued that the first respondent's letter to them informing them of the rejection of their appeal and counter-proposals had failed to disclose reasons for the rejection, and that it was unreasonable on the part of the first respondent to not have taken into account the applicants' traffic report in making their decision.

A The first respondent opposed the application as follows: (i) the applicants had no locus standi; (ii) the applicants lacked sufficient interest; (iii) the letter was not a decision in the relevant sense for judicial review; (iv) the proper party to be brought was the Government of Malaysia; and (v) the first respondent had acted fairly and reasonably.

B **Held**, dismissing the application:

(1) Order 53 of the Rules of the High Court 1980 governs the law pertaining to applications for leave for an order for certiorari. Generally, the application is made ex parte; however, at the discretion of the court it can be heard on an inter partes basis. C When deciding whether to hear an application on an inter partes basis, regard must also be had to the importance and novelty of the issue raised.

The court, in exercising its discretion that an application for leave be granted, must be convinced by the applicants that prima D facie the application is genuine and that there is some substance in the grounds supporting the application. The test's threshold is very low; a prima facie case of reasonable suspicion, an arguable case must be shown, not a prima facie case. Additionally, an application will fail if it is frivolous, vexatious, misconceived, made by busybodies with misguided or trivial complaints of E administrative errors, groundless, where there are more appropriate alternative remedies, and where the application for judicial review is inappropriate (see pp 233G–I, 234A–I and 235A–F); *R v Secretary of State, ex p Begum* [1990] COD 107, *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 F MLJ 442 and *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298, *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228, *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 and *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts* G [1996] 1 SLR 609 followed.

(2) The applicants lacked locus standi to bring the application, as they failed to show that their rights — whether statutory or common law — would be adversely affected by the decision or action of an authority. In the present case, the applicants' H established rights were unaffected; their complaint was that the proposed highway interchange would cause inconvenience to them. In a situation where no legal rights are affected, the remedy of certiorari is inappropriate (see pp 235H–I and 236A–C).

(3) The applicants' complaint that the first respondent had failed to I consider their appeal and counter-proposals was without merit as the letter clearly indicates that they were in fact considered but rejected (see p 236D–I).

(4) The first respondent was not the proper party in this action; rather, the Government of Malaysia should have been named. The first respondent was established under the Act, and its

statutory powers were limited to supervising and executing the design, construction and maintenance of highways as determined by the government. Hence, the government was the decision-maker and the first respondent merely the supervisor and executor of the decision. The first respondent thus had no decision-making powers; it could not modify the design and construction of the interchange. For this reason too, the application for leave ought to be refused (see p 237D–H); *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 followed.

(5) The precise decision challenged by the applicants was unclear. What the applicants appeared to be challenging was merely a decision to reject the applicants' appeal and counter-proposals. This so-called decision was not amenable to certiorari as the first respondent was under no duty to hear such appeals, nor consider any counter-proposals. In the final analysis, the decision to reject the counter-proposals may be loosely termed as a managerial decision which was not amenable to judicial review (see pp 237I, 238A and 239E); *R v Secretary of State for Employment, ex p Opportunities Commission* [1995] AC 1 and *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 followed.

(6) Even if the first respondent was the proper party, the grounds upon which the decision was being challenged was unclear. Judicial review of an administrative action can be made under three grounds: (i) illegality; (ii) irrationality; and (iii) procedural impropriety. In the present case, a weak attempt was made to allege that the letter was procedurally improper in so far as the first respondent failed to consider the traffic problem. This allegation was without merit. No duty was shown to exist on the part of the first respondent to consider the applicants' appeal or a duty that the applicants should be heard before the appeal was rejected. No procedural impropriety, illegality, or irrationality could be imputed to the decision made to reject the applicants' counter-proposals (see pp 238B–F and 239D–E); *Council Of Civil Service Unions v Minister for Civil Service* [1984] 3 All ER 935 followed; *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1977] 2 MLJ 17, *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara Malaysia & Anor* [1994] 2 MLJ 114, *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 and *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489 distinguished.

[Bahasa Malaysia summary

Kedua-dua pemohon merupakan pemaju dan tuan punya pembangunan perdagangan dan kediaman yang dikenali sebagai Bandar Utama ('pemohon-pemohon'). Mereka memohon kebenaran

untuk membatalkan kelulusan yang diberikan oleh Lembaga Lebuhraya Malaysia ('penentang pertama') untuk tatarajah persimpangan Lebuhraya Damansara-Puchong yang dicadangkan di Jalan Damansara yang mengaitkan Bandar Utama. Penentang pertama merupakan badan berkanun yang ditubuhkan di bawah Akta Lembaga Lebuhraya Malaysia (Perbadanan) 1980 ('Akta tersebut') dan adalah pihak berkuasa yang bertanggungjawab atas penyeliaan dan pelaksanaan rekabentuk, pembinaan dan penyelenggaraan lebuhraya di bawah Akta tersebut. Permohonan untuk kebenaran didengar atas dasar inter partes kerana pembinaan telah bermula dan justeru itu merupakan perkara yang memerlukan tindakan segera untuk pemohon-pemohon yang terlibat.

Pemohon-pemohon tidak puas hati dengan keputusan penentang pertama mengenai tatarajah persimpangan lebuhraya kerana ia akan menjejaskan aliran lalu lintas dan dengan itu menjejaskan Bandar Utama. Pemohon-pemohon merayu dan menyerahkan cadangan balas berdasarkan laporan perunding lalu lintas. Namun demikian, penentang pertama menolak penhujahan mereka dan memaklumkan kepada pemohon-pemohon tentang yang sama menerusi surat mereka bertarikh 16 November 1996 ('surat tersebut'). Persimpangan akan dibina seperti yang dirancang.

Pemohon-pemohon menghujahkan bahawa memandangkan kedudukan mereka sebagai tuan punya dan pemaju Bank (Bandar) Utama, mereka adalah pihak terkilan kerana pembangunan dan aliran lalu lintas berterusan di Bandar Utama akan terjejas oleh tatarajah persimpangan yang dicadangkan. Mereka menghujahkan bahawa penentang pertama, dalam membuat keputusannya, telah gagal mengambil kira perkara-perkara yang relevan seperti keupayaan jalan-jalan yang wujud dalam merekabentuk tatarajah yang dicadangkan. Pemohon-pemohon menghujahkan bahawa surat penentang pertama kepada mereka yang memaklumkan penolakan rayuan dan cadangan balas mereka telah gagal mendedahkan alasan untuk penolakan, dan bahawa adalah tidak munasabah pada pihak penentang pertama untuk tidak mengambil kira laporan lalu lintas pemohon-pemohon dalam membuat keputusan mereka.

Penentang pertama menentang permohonan itu seperti yang berikut: (i) pemohon-pemohon tidak mempunyai sebarang locus standi; (ii) pemohon-pemohon kekurangan kepentingan yang mencukupi; (iii) surat itu bukanlah keputusan dalam makna yang relevan untuk kajian semula kehakiman; (iv) pihak yang wajar untuk dibawa adalah Kerajaan Malaysia; dan (v) penentang pertama telah bertindak secara adil dan munasabah.

Diputuskan, menolak permohonan:

(1) Aturan 53 Kaedah-Kaedah Mahkamah Tinggi 1980 menguasai undang-undang berkenaan dengan permohonan untuk kebenaran perintah certiorari. Pada amnya, permohonan dibuat secara ex parte; bagaimanapun, atas budi bicara mahkamah ia boleh didengar secara inter partes. Dalam memutuskan sama ada untuk

mendengar sesuatu permohonan atas dasar inter partes, kepentingan dan kebaharuan isu yang dibangkitkan juga mesti diambil kira.

Dalam melaksanakan budi bicara supaya suatu permohonan untuk kebenaran dibenarkan, mahkamah mestilah diyakinkan oleh pemohon-pemohon bahawa permohonan adalah tulen dan bahawa alasan yang menyokong permohonan adalah kukuh. Nilai ambang ujian adalah amat rendah; kecurigaan munasabah kes prima facie, kes yang dapat dipertikaikan mesti ditunjukkan, bukannya kes prima facie. Tambahan pula, permohonan akan gagal sekiranya ia adalah remeh, menyusahkan, salah tanggap, yang dibuat oleh orang yang suka menjaga tepi kain orang yang kurang memahami aduan kesilapan pentadbiran, tidak berasas, di mana terdapat remedi alternatif yang lebih wajar, dan di mana permohonan untuk kajian semula kehakiman adalah tidak wajar (lihat ms 233G–I, 234A–I dan 235A–F); *R v Secretary of State, ex p Begum* [1990] COD 107, *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442 dan *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298, *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228, *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 dan *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts* [1996] 1 SLR 609 diikut.

(2) Pemohon-pemohon kekurangan locus standi untuk membawa permohonan, kerana mereka gagal menunjukkan bahawa hak mereka — sama ada statutori atau common law — akan dijejaskan oleh keputusan atau tindakan pihak berkuasa. Dalam kes ini, hak pemohon-pemohon yang terbukti tidak terjejas; aduan mereka adalah bahawa persimpangan lebuhraya yang dicadangkan akan menyebabkan kesulitan kepada mereka. Dalam keadaan di mana tiada hak undang-undang akan terjejas, remedi certiorari adalah tidak wajar (lihat ms 235H–I dan 236A–C).

(3) Aduan pemohon-pemohon bahawa penentang pertama telah gagal mempertimbangkan rayuan dan cadangan balas mereka adalah tanpa merit kerana surat tersebut jelas menunjukkan bahawa pada hakikatnya mereka telah dipertimbangkan tetapi ditolak (lihat ms 236D–I).

(4) Penentang pertama bukanlah pihak yang wajar dalam tindakan ini; malah, Kerajaan Malaysia sepatutnya telah dinamakan. Penentang pertama diwujudkan di bawah Akta tersebut, dan kuasa-kuasa statutorinya dihadkan kepada penyeliaan dan pelaksanaan rekabentuk, pembinaan dan penyelenggaraan lebuhraya seperti yang ditentukan oleh kerajaan. Justeru itu, kerajaan adalah pembuat keputusan dan penentang pertama cumalah penyelia dan pelaksana keputusan. Dengan itu, penentang pertama tidak mempunyai kuasa membuat keputusan; ia tidak boleh mengubah rekabentuk atau pembinaan persimpangan.

Untuk sebab ini juga, permohonan untuk kebenaran patut ditolak (lihat ms 237D–H); *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 diikut.

(5) Keputusan yang manakah yang dicabar oleh pemohon-pemohon adalah tidak jelas. Apa yang seolah-olah dicabar oleh pemohon-pemohon cumalah keputusan untuk menolak rayuan dan cadangan balas pemohon-pemohon. Keputusan yang dikatakan tidak tertakluk kepada certiorari kerana penentang pertama tidak wajib mendengar rayuan sedemikian, atau untuk mempertimbangkan apa-apa cadangan balas. Sebagai kesimpulan, keputusan untuk menolak cadangan balas secara longgar boleh disifatkan sebagai keputusan pengurusan yang tidak tertakluk kepada kajian semula kehakiman (lihat ms 237I, 238A dan 239E); *R v Secretary of State for Employment, ex p Opportunities Commission* [1995] AC 1 dan *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 diikut.

(6) Sekalipun penentang pertama adalah pihak yang wajar, alasan-alasan atas mana keputusan dicabar adalah tidak jelas. Kajian semula kehakiman suatu tindakan pentadbiran boleh dibuat di bawah tiga alasan: (i) kepenyalahan undang-undang; (ii) keadaan yang tidak rasional; dan (iii) ketidakpatuhan prosedur. Dalam kes ini, percubaan yang lemah dibuat untuk mengatakan bahawa surat tersebut adalah tidak elok dari segi prosedur setakat mana penentang pertama gagal mempertimbangkan masalah lalu lintas. Pengataan ini adalah tanpa merit. Tiada kewajipan ditunjukkan wujud pada pihak penentang pertama untuk mempertimbangkan rayuan pemohon-pemohon atau kewajipan bahawa pemohon-pemohon harus didengar sebelum rayuan ditolak. Tiada ketidakpatuhan, kepenyalahan undang-undang atau keadaan yang tidak rasional dari segi prosedur boleh dikatakan disebabkan oleh keputusan yang dibuat untuk menolak cadangan balas pemohon-pemohon (lihat ms 238B–F dan 239D–E); *Council of Civil Service Unions v Minister for Civil Service* [1984] 3 All ER 935 diikut; *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1977] 2 MLJ 17, *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara Malaysia & Anor* [1994] 2 MLJ 114, *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 dan *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489 dibeza.]

Notes

For cases on certiorari, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2775–2812.

For cases on judicial review, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 23–33.

Cases referred to

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228 (folld)
Chan Hiang Leng Colin & Ors v Minister for Information and the Arts [1996] 1 SLR 609 (folld)
Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 (folld)
Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17 (distd)
Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia [1989] 3 MLJ 298 (folld)
Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara Malaysia & Anor [1994] 2 MLJ 114 (distd)
Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors [1996] 3 MLJ 489 (distd)
Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (distd)
Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd [1982] AC 617 (folld)
Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789 (distd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (distd)
R v Secretary of State, ex p Begum [1990] COD 107 (folld)
R v Secretary of State for Employment, ex p Equal Opportunities Commission [1995] AC 1 (folld)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442 (folld)

Legislation referred to:

Rules of the High Court 1980 O 53
Highway Authority Malaysia (Incorporation) Act 1980 s 11

K Kirubakaran (*Joseph Yeo* with him) (*Kiru & Yong*) for the applicants.
Cyrus Das (*Ramesh Sanghir* with him) (*Kassim, Tadin, Wai & Co*) for the first respondent.
Ng Aik Guan (*Ching, Tan & Associates*) for the second respondent.
Pretam Singh (Senior Federal Counsel) watching brief for the Government of Malaysia.

Visu Sinnadurai J: In this application, the applicants sought leave to apply for an order for certiorari under O 53 of the Rules of the High Court 1980.

The applicants initially sought leave to quash the 'approval of the proposed Damansara-Puchong Highway interchange configuration at Jalan Damansara linking Bandar Utama by the first respondent' (the Lembaga Lebuhraya Malaysia) — see encl (1).

A However, by a subsequent application (encl 10), the applicant sought to amend the main application by seeking the following relief:

> An order of certiorari directed to the first respondent to quash the decision dated 16 November 1996 communicated by the first respondent on 19 November 1996 and/or the approval by the first respondent to approve
B the interchange configuration of the proposed Damansara-Puchong Highway at Jalan Damansara linking it to Bandar Utama.

As there appeared to be some urgency on the matter, especially since the construction of the highway had already commenced, the application for leave was heard on an inter partes basis.

C *The facts*

The first applicant, Bandar Utama Development Sdn Bhd, is the developer of a commercial and residential development known as 'Bandar Utama', whilst the second applicant, Bandar Utama City Corporation Sdn Bhd, is
D the landowner of all the commercial properties and the undeveloped residential units of Bandar Utama.

The first respondent, Lembaga Lebuhraya Malaysia, a body established under the Highway Authority (Incorporated) Act 1980 ('the Act'), is the authority responsible for the supervision and execution of the design, construction and maintenance of highways under the Act.

E The second respondent, Lingkaran Trans Kota Sdn Bhd, is a construction company who was granted the concession for the construction of the privatization of the Damansara-Puchong Highway. This proposed highway involves the stretch of Jalan Damansara passing through certain junctions at Bandar Utama.

F The first applicant, being unhappy with certain of the proposed highway's interchange configuration, especially those near Bandar Utama, had appealed to the first respondent to reconsider their decision, and had also submitted certain counter-proposals, based on findings of a traffic consultant.

G According to the applicant's traffic consultant, the existing three junctions at Bandar Utama (with two right exits to Jalan Damansara) were able to satisfy 99% of the peak traffic, whilst the proposed highway interchange configuration at Junction B (providing only one right access) would adversely affect the traffic flow by reducing it to 47%.

H By a letter dated 16 November 1996, the first respondent informed the applicants that the Technical Committee of the privatization of Damansara-Puchong Highway had considered the applicant's objections and had rejected the applicants' appeal and counter-proposals.

The applicants then instituted the present action. The applicants argue that as landowners and developers of Bandar Utama, they are
I aggrieved parties as the continued development of Bandar Utama will be adversely affected by the proposed interchange configuration. As the registered proprietors of the commercial properties within Bandar Utama,

the second applicant claimed that they would be affected by any negative impact on the traffic flow by the respondents' highway interchange configuration at Junction B.

The applicants' arguments

The applicants argue that the proposed highway interchange configuration will have a negative impact on the traffic dispersal from Bandar Utama, and that the first respondent had failed to take into account relevant matters such as capacity of the existing roads in designing the proposed configuration.

It was also argued by the applicants that the first respondent in communicating to the applicants the decision to reject the applicants' appeal by their letter dated 16 November 1996 had not given any reasons for the rejection.

Further, it was said, that it was unreasonable on the part of the first respondent not to have taken into account the applicants' traffic report.

The respondents' arguments

The first respondent raised several grounds in opposing the application for leave, namely:

(i) that the applicants had no locus standi;

(ii) that the applicants had no sufficient interest;

(iii) that the first respondent's letter dated 16 November 1996 was not a 'decision' in the relevant sense for purposes of judicial review;

(iv) that to compel the first respondent to accept the applicants' counter-proposals was indirectly to compel the government;

(v) that even if the applicants were granted leave, in the final analysis, it would be an exercise in futility;

(vi) that the proper party to be brought was the Government of Malaysia; and

(vii) that the first respondent had acted fairly and reasonably.

Of particular importance are grounds (iii) and (vi). It was argued that the letter of 16 November 1996 was not a decision for purposes of judicial review. The first respondent was only one of the constituent members of the Technical Committee. The Technical Committee had deliberated on the applicants counter-proposals and only thereafter did it reject the proposal. As far as the first respondent was concerned, it merely communicated the decision of the Technical Committee to the applicants. In the premises, it was therefore submitted that the letter of 16 November 1996 did not become a 'decision' merely because the applicants were 'invited' to submit their counter-proposals, nor by the fact that the first respondent had informed the applicants that their appeal had been rejected.

It was further argued, relying on a similar argument raised by counsel in the House of Lords' decision of *R v Secretary of State For Employment, ex p Equal Opportunities Commission* [1995] AC 1, that the letter of

19 November 1996 could not in principle amount to a decision because in the absence of a relevant duty on the part of the first respondent, or an alleged refusal to carry out such a duty, an application for judicial review could not be founded.

It was further stressed by the first respondent, that, in fact, the original decision on the interchange configuration had been made by the government and not by the first respondent. Therefore, the applicants ought to have sued the government and not the first respondent. However, as the government was not made a party to these proceedings, the application ought to be struck off. As far as the second respondent was concerned, the second respondent was merely granted the concession to construct the highways under the concession agreement made between the government and the second respondent. As such, any matters pertaining to the interchange configuration that had been approved by the government, as being part and parcel of the concession agreement, ought to have been addressed to the government and not against the second defendant. Since the government was not a party in these proceedings, the applicants' grievance was again directed to the wrong party.

Furthermore, it was said that the decision of the government pertaining to the interchange configuration were not matters for the courts to determine unless some statutory provisions had been breached. Otherwise, it would involve the courts in making a decision on the merits of the applicants' counter-proposals, and in balancing the pros and cons of the counter-proposals. It was submitted that the courts were not permitted to do this, as it would involve an usurpation of the powers and responsibilities that rightly belonged to the government and not the first respondent.

Taking the above matters into consideration, it was submitted that the applicants had not made out a 'prima facie case of reasonable suspicion' or 'an arguable case' and that the application was 'frivolous and vexatious', and therefore the application ought to be dismissed with costs.

The law applicable at leave stage

The law relating to the application for leave to apply for an order for certiorari is governed by O 53 of the Rules of the High Court 1980.

Generally such an application is made ex parte, but it may, at the direction of the court be heard on a inter partes basis. In the case of *R v Secretary of State, ex p Begum* [1990] COD 107, the English Court of Appeal observed as follows:

> If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that inter partes leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award, ... namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

This observation was quoted with approval by the Federal Court in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442.

Though the granting of leave is discretionary, in an application for leave, however, the court is governed by certain principles. These principles are now generally well established. In *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228, Ajaib Singh SCJ in delivering the judgment of the Supreme Court observed at p 229:

> The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application.

In *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298, Edgar Joseph Jr J (as he then was) observed at p 299:

> I approach this application by reminding myself that under O 53 r 3, the court exercises discretion whether to grant leave to apply for judicial review. The court is here first looking only at the ex parte application and is concerned to see whether prima facie there is a genuine case for review.

His Lordship then set out the following principles as stated by Lord Diplock in *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 at p 644:

> If, on a quick perusal of the material then available, the court [that is the judge who first considers the application for leave] thinks that it discloses what might on further consideration turn out to be arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.

In *Dr Amir Hussein*'s case, Edgar Joseph Jr J also heard the application for leave on an inter partes basis, 'having regard to the importance and the novelty of the issues raised'.

More recently, in *Patco*'s case referred to above, the proper test to be applied was also considered by the Federal Court. Further, in the Singapore Court of Appeal decision of *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts* [1996] 1 SLR 609, Karthigesu JA, in delivering the judgment of the Court of Appeal observed, after referring to Lord Diplock's observation in *National Federation of Self Employed* referred to above, as follows (at p 616):

> This passage appears susceptible to two slightly different interpretations. One is that the court should quickly peruse the material put before it and consider whether such material discloses 'what might on further consideration turn out to be an arguable case'. The other is that the applicant had to make out a 'prima facie case of reasonable suspicion'. In our view, both tests present a very low threshold and it is questionable whether there is really any difference in substance between the two interpretations.
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> In *R v Commissioner for the Special Purposes of the Income Tax Acts, ex p Stipplechoice Ltd* [1985] 2 All ER 465, the English Court of Appeal held that the applicant had shown 'a good arguable case' and has thus, 'established a

A prima facie case' for judicial review. Leave was then granted in that case despite the applicant having twice been refused leave below. It appears that in [*Re Application by Dow Jones (Asia) Inc* [1988] 1 MLJ 222], TS Sinnathuray J applied the same test of whether there is an arguable case. It is again questionable whether there is any difference between this test and the one stated in the paragraph above.

B However, in the Malaysian case of *George John v Goh Eng Wah Bros Filem Sdn Bhd & Ors* [1988] 1 MLJ 319, Lim Beng Choon J appeared to have applied the following test:

> 'Another requirement at this stage of the proceeding which a court has to consider is that the applicant must produce sufficient evidence to sustain a prima facie case that a public officer or authority that made
C the decision had acted unlawfully or that he or it had in its exercise of discretion acted ultra vires the power given to him or it under the relevant statute.'

This case was relied on by Mr Reddy. In our view, if this case seeks to impose a higher threshold than that of an arguable case, then we ought not
D to follow it. This is because it would be against the weight of the other authorities. What is required is not a prima facie case, but a prima facie case of reasonable suspicion. If the latter can be shown, then it cannot be said that the application must necessarily fail, for there would then appear to be an 'arguable case'.

Generally, it may be said that in addition to the above tests, leave will be
E refused where the applications are: (i) frivolous and vexatious or hopeless; (ii) made by busybodies with misguided or trivial complaints of administrative errors; (iii) misconceived; (iv) unarguable or groundless; and (v) where there is a more appropriate alternative remedies; (vi) where an application for judicial review is an inappropriate procedure: — see de
F Smith, Woolf and Jowell, *Judicial Review of Administrative Actions* (5th Ed, 1995) at pp 662–663.

The present application

At the commencement of the hearing, counsel for the applicants correctly
G conceded that the application against the second respondent was misconceived, as the second respondent being merely a private company was not amenable to judicial review.

I now move on to consider whether leave ought to be granted in this application against the first respondent, the highway authority.

H (i) Rights of parties

One of the important circumstances when certiorari will lie is when the complainant's rights, be it statutory or common law, are adversely affected by the decision or action of an authority. As pointed out in *Halsbury's Laws of England* Vol 1(1) (4th Ed, 1989 Reissue) para 112:

I

> Certiorari and prohibition will issue to quash or prohibit the determinations of any body or persons having legal authority to determine questions affecting the common law or statutory rights or obligations of other persons as individuals.

In the present case, the applicants have not challenged that any of their *rights* had been affected by the construction of the proposed highway

interchange. It should also be noted that the applicants had not challenged the construction of the entire highway. They have merely stated that they 'are affected and aggrieved parties', or that they are 'unhappy' with the particular interchange at Bandar Utama.

Basically, what the applicants are contending is that the construction of the proposed interchange does not affect any of their established rights, but rather it will cause them an inconvenience. No authority was cited in support of the applicants' contention. It must be observed that any new change to existing roads and highways, generally will cause some advantage to certain members of the public, whilst it may cause inconvenience to others. But merely because the proposed changes will entail some discomfort or inconvenience to persons residing in the Bandar Utama area does not, by itself, render the construction of the interchange unreasonable or void. Clearly, in such a situation, where no legal rights are affected, the remedy of certiorari appears to be inappropriate.

(ii) The applicants' appeal and counter-proposals

It was suggested that the respondents' failure to consider the applicants' appeal or their counter-proposals to make modifications to the proposed interchange rendered the decision of the respondent unreasonable. But this argument is unsubstantiated and in any case, without merit. The letter written by the first respondent dated 16 November 1996 clearly stated that the applicants' appeal and the counter-proposals were carefully considered by the Technical Committee. The relevant part of the letter reads as follows:

> 2.0 Pihak Lembaga Lebuhraya Malaysia (LLM) mengucapkan terima kasih di atas cadangan balas pihak tuan dan *kami telah memberi perhatian dan pertimbangan yang serius ke atas cadangan tersebut.* Seperti yang tuan sedia maklum, pihak LLM telah memanggil satu mesyuarat khas Jawatankuasa Teknikal (senarai keahlian seperti di Lampiran I) pada 16 November 1996 di mana pihak tuan telah diberi peluang untuk membentangkan rayuan tuan kepada jawatankuasa tersebut.
>
> 3.0 *Setelah mengkaji dengan mendalam ke atas cadangan dan rayuan pihak tuan tersebut,* adalah dimaklumkan bahawa Jawatankuasa Teknikal Penswastaan Lebuhraya Damansara-Puchong yang telah bermesyuarat pada 16 November 1996 telah membuat keputusan dan sebulat suara tidak dapat menerima rayuan dan cadangan pihak tuan berkenaan. Sehubungan dengan itu, lokasi dan konfigurasi Persimpangan Bertingkat Bandar Utama (Persimpangan B) adalah kekal seperti yang telah termaktub dan ditetapkan di dalam perjanjian konsesi. (Emphasis added.)

In fact, the applicants themselves instituted the present proceedings only after they were informed that the applicants' appeal and counter-proposals had been rejected by the Technical Committee. I therefore fail to understand how it could now be contended that the respondents had failed to consider the applicant's objections.

(iii) Proper authority

In *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at p 949, Lord Diplock laid down the following general principles:

> To qualify as a subject for judicial review, the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either: (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or (b) by depriving him of some benefit or advantage which either: (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. ...
>
> For a decision to be susceptible to judicial review, the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph.

Applying the above test, there is much merit in the respondents' argument that the wrong party had been sued in the present case. There is no evidence to indicate that the applicants had a legitimate expectation, or had been given some assurance by the first respondent that no changes would be made to the existing roads in Bandar Utama. More importantly, the first respondent was not in a position to do so. The first respondent is a statutory body established under the Act. The statutory powers bestowed on the first respondent is provided for in s 11 of the Act. It provides that:

> The function of the Authority are: (a) to supervise and execute the design, constructions and maintenance of highways as determined by the Federal Government; ... .

In other words, the design, construction and maintenance of highways are determined by the government, whereas, the first respondent's powers are merely to supervise and to execute these matters which had already been determined by the government. Therefore, as pointed out by the respondents, any changes and modifications to the design and the construction of the highways are determined by the government, and not the first respondent. The applicants' cause of action, if any, therefore is against the government and not against the highway authority, the first respondent. For this reason too, the application for leave ought to be refused.

(iv) Decision being impugned

The precise decision which is being challenged by the applicants is unclear. Clearly, it is not the decision to construct the entire highway, nor is it the decision to construct the particular interchange at Bandar Utama. What the applicants appear to be challenging is merely a decision — if it may be called a decision — in rejecting the applicants' appeal and counter-proposals. It appears that following the decision in *Equal Opportunities Commission*'s case quoted above, this so-called decision in rejecting the appeal and the counter-proposals is not amenable to certiorari as the first

respondent was under no duty to hear such appeals, nor to consider any counter-proposals. A

(v) Grounds for judicial review

Even assuming that the proper party was cited as the respondent, the grounds upon which the decision is being challenged is unclear. In *Council of Civil Service Unions v Minister for the Civil Service*, Lord Diplock stated the grounds on which judicial review may be sought. In that case, Lord Diplock observed (at p 950): B

> ... one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. C

The scope of these grounds, including the other ground of proportionality, was recently explained by Edgar Joseph Jr FCJ in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (FC) and by Jemuri CJ (Borneo) in *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara Malaysia & Anor* [1994] 2 MLJ 114 (SC). D

In the present application, it is difficult to appreciate which of these grounds the applicants is relying on. Though there was a weak attempt on the part of the applicants to allege that the decision made on 16 November was procedurally improper, in so far as the first respondent did not consider the traffic problem, I am of the view that this allegation is also without merit and is bound to fail. Again, no duty was shown to exist on the part of the first respondent to consider the applicants' appeal, or a duty that the applicants ought to be heard before the appeal was rejected. In this regard, the cases dealing with planning permission, like the recent decision of the Court of Appeal in *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 (CA) or cases dealing with dismissal of employees like in *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara Malaysia & Anor* [1994] 2 MLJ 114 (SC), *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 (CA), *R Rama Chandran v Industrial Court of Malaysia* [1997] 1 MLJ 145 (FC), *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 (SC), *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489 (CA), some of which were cited by the applicants, may be distinguished on the ground that in those cases, there were either breaches of statutory duties, or that the public body had acted in violation of the principles of public law. No such duty was shown to exist in the present case, nor that the conduct of the respondents was ultra vires or unlawful. E F G H

Conclusion I

In the final analysis, I am of the view that leave to apply for certiorari ought to be refused in the present case. For reasons already stated above, it appears to be clear that the applicants have cited the wrong party as the respondent in this application. It has been shown that the first respondent

A is not the proper authority to determine the design of the highway, especially the various interchanges. The first respondent is merely authorized by the Act to supervise and maintain the highways which had already been designed and approved by the government.

Secondly, even if it could be said that the first respondent had the B powers to made modifications to the design of the highway, particularly to the various interchanges, the applicants have failed to establish even an arguable case that the first respondent had acted unlawfully, or had failed to follow certain procedures, or even exceeded their powers. Judicial review is to remedy a public law wrong. But no public law wrong has been shown to have been committed by the first respondent such as to make the C first respondent's decision amenable to judicial review.

Again it must be emphasized that the applicants are not challenging the decision to construct the highway, or for that matter the particular interchange at Bandar Utama. What they are attempting to challenge is the rejection of their counter-proposals to modify the interchange at Bandar D Utama according to their own design. The counter-proposals of the applicants were considered by the relevant authorities, and only after careful study and consideration were the counter-proposals rejected. No procedural impropriety, illegality, or irrationality, could be imputed to the decision made to reject the applicants' counter-proposals. In the final analysis, the decision to reject the counter-proposals of the applicants may E be loosely termed as a 'managerial decision' which is not amenable to judicial review: see *National Federation of Self Employed Small Businesses.*

Finally, I should observe that the granting of leave is not a mere formality. The need for leave is to filter the cases that would otherwise proceed for a full hearing. The importance of the leave stage is aptly stated F by Clive Lewis in *Judicial Remedies in Public Law* (Litigation Library, Sweet & Maxwell (1992)) at p 230:

> The requirement of leave is designed to filter out applications which are groundless or hopeless at an early stage. The purpose is: '... to prevent the time of the court being wasted by busybodies with misguided or trivial G complaints of administrative error and to remove the uncertainty in which public ... authorities might be left ... '. As such, the aim is to prevent a wasteful use of judicial time and to protect public bodies from the harassment (intentional or otherwise) that might arise from the need to delay implementing decisions, where the legality of such decisions has been challenged. The leave requirement also enables an individual to obtain a H quick and relatively cheap judicial consideration of whether his case has any prospect of success.

Bearing the above principles in mind, I dismiss the applicants' application for leave to apply for certiorari as the applicants had failed to demonstrate an arguable case that grounds exist for judicial review.

I *Application dismissed.*

Reported by K Tang-Wai